NO. 81328-1

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

THE ESTATE OF PAMELA L. KISSINGER,

Respondent,

v.

JOSHUA HOGE,

Appellant.

SUPPLEMENTAL BRIEF OF ~~APPELLANT~~ PETITIONER

JEAN O'LOUGHLIN# 14756
Attorney for Appellant
Department of Assigned Counsel
949 Market Street, Suite 334
Tacoma, WA 98402-3696
(253) 798-3980

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

STATUTES

A. IDENTITY OF PETITIONER

Joshua Hoge is the appellant in this matter.

B. COURT OF APPEALS DECISION

The Court of Appeals filed a published opinion in the above entitled case on December 3, 2007 and an order denying the motions for reconsideration on January 17, 2008. Joshua Hoge is seeking review of that portion of the Court of Appeals decision that found his actions in killing his mother were willful and unlawful, although he was found not guilty by reason of insanity of that killing.

C. ISSUES PRESENTED FOR REVIEW

1. For purposes of the slayer's statute, can a person's actions legally be termed unlawful when that person was found not guilty by reason of insanity for those very actions?
2. For purposes of the slayer's statute, can Mr. Hoge's actions be found to have been willful?

D. STATEMENT OF THE CASE

See Petition for Review.

E. ARGUMENT

1. THE ESTATE HAS NOT MET ITS BURDEN OF PROVING THAT HOGE'S KILLING OF HIS MOTHER WAS UNLAWFUL.

The burden of proving that Mr. Hoge's killing of his mother was unlawful is placed squarely on the estate. *Cook v. Gisler*, 20 Wn. App. 677, 683, 582 P.2d 550 1978) held:

> ...when the slayer statute...is asserted to defeat the claim of one who otherwise would be entitled to inherit, the burden of proof is upon the party seeking the benefit of the statute to prove the killing was willful and also that it was unlawful.

The burden of proof is on the estate to prove Mr. Hoge's actions were **unlawful.** The burden is not on Mr. Hoge. And certainly the burden is not on Mr. Hoge to show his actions were **lawful**. The estate at times seems to imply that Mr. Hoge must show that his actions are somehow sanctioned by society. They definitely are not. But they are not unlawful.

The distinction between the estate proving Mr. Hoge's actions were unlawful and Mr. Hoge proving his actions were lawful is an important one. *Cook* emphasized that distinction when they decided which party had the burden of proof. It said at pp. 551-552:

> This appeal presents two basic issues, (1) did the trial court apply the proper burden of proof when it required the **defendants to establish by a preponderance of the evidence that the killing was unlawful instead of requiring the plaintiff to prove that it was lawful**? [Emphasis added]

The Court there decided that the defendants in that case had to prove the killing was unlawful. The estate and the Court of Appeals have ignored this distinction. The Court of Appeals said that the criminal code defines what makes a homicide lawful (at p. 79). As *Cook* determined lawfulness is not the issue.

a. THE LEGISLATURE AND WASHINGTON COURTS HAVE DETERMINED THAT LEGAL INSANITY IS AN AFFIRMATIVE DEFENSE TO THE CRIME OF MURDER.

Insanity is a defense to the crime of murder. There can be no argument on this point. The only possible result when this defense is proven is a finding of not guilty, an acquittal. There can be no conviction. There can be no criminal culpability. There can be no judgment and sentence. It is not rendered unlawful under the laws of the State of Washington.

The legislature has spoken directly on the subject of insanity as a

defense. RCW 9A.12.010 and RCW 10.77.030(2) prescribe that insanity is a defense. It's a complete defense to a crime. Then Ch. 10.77 RCW dictates the process for proving this defense. The legislature has explicitly determined that insanity is a defense to murder. The result here might be different if the legislature adopted the guilty but insane verdict, but it has not. The clear legislative intent must be followed.

Case law in Washington is in complete accord with the legislature. The established rule of law in Washington is that a finding of not guilty by reason of insanity is a **complete defense** to the crime of murder. It completely absolves a defendant of all criminal responsibility. State v. Crenshaw, 98 Wn. 2d 789, 659 P.2d 488 (1983), State v. White, 60 Wn. 2d 551, 592, 374 P.2d 942 (1962), State v. Hutsell, 120 Wn.2d 913, 845 P.2d 1325 (1993). Mr. Hoge's actions were not as a matter of law unlawful.

b. RCW 9A.32.010 IS NOT DETERMINATIVE AS TO WHETHER MR. HOGE'S ACTIONS WERE UNLAWFUL.

The estate and the Court of Appeals cite RCW 9A.32.010 for the proposition that it defines when homicide is lawful. The Court of Appeals opinion reads in part at p. 79: "The criminal code [citing RCW 9A.32.010] defines what defenses make a homicide lawful and insanity is

not one of them." Again, whether a killing committed while legally insane is lawful is not the issue here. The issue here is whether the estate has proven that Mr. Hoge's action were unlawful.

Further, RCW 9A.32.010 does not stand for that proposition. It makes no such broad pronouncement. RCW 9A.32.010 never uses the terms "lawful" or "unlawful". What RCW 9A.32.010 does say is:

> Homicide is the killing of a human being by the act, procurement, or omission of another, death occurring at any time, and is either (1) murder, (2) homicide by abuse, (3) manslaughter, (4) excusable homicide, or (5) justifiable homicide.

That statute defines homicide and says it falls within one of 5 categories. A killing when legally insane does not fit within any of the categories. It is not murder (Mr. Hoge was found not guilty of murder). It is not homicide by abuse. It is not manslaughter. Neither does it precisely fit the Ch. 9A.16 definitions of either excusable or justifiable homicide. Although, the entire policy behind the defense of insanity is that it is an act, though committed, is excused by the criminal law.

The estate argues that because the insanity defense does not fit within categories 4 or 5 of the statute, killings committed by reason of insanity are unlawful. According to that same logic, it is equally

persuasive to say that because the insanity defense does not fit within the first 3 categories, it is **not unlawful** because the first 3 categories establish when homicide is unlawful.

The more thoughtful approach is to acknowledge that the affirmative defense of insanity does not fit precisely within any of the five categories of RCW 9A.32.010. Therefore, the answer as to whether an act committed while legally insane is unlawful must be found elsewhere.

The legislature has spoken directly on this subject and its mandate controls the issue presented here. Ch. 10.77 and 9A.12 RCW are clear expressions of the legislative intent on this subject. Legal insanity, when proven, is a complete defense. A killing committed while legally insane, although horrendous, is not unlawful. It is an excusable act because it is the act of a diseased mind. The legislature's directives are completely in line with the case law on this topic which undeniably establishes insanity as a complete defense to the charge of murder.

It's interesting to note that the estate has not responded to the application of this clear expression of legislative intent. How can a person's actions be termed unlawful when that person, by force of statute, **must** be and is, acquitted of any criminal culpability for those actions.

The estate never squares its arguments with all of this law.

c. STATE V. BOX REAFFIRMS INSANITY AS AN AFFIRMATIVE DEFENSE TO THE CHARGE OF MURDER.

State v. Box, 109 Wn.2d 320, 745 P.2d 23 (1987) reaffirms insanity is an affirmative defense to the charge of murder in the State of Washington. The issue in *Box* was which party had the burden of establishing insanity as a defense. The holding in that case was at p. 322:

> CONCLUSION. Insanity, by force of statute, is an affirmative defense in the State of Washington which must be raised by the defendant and proved by a preponderance of the evidence.

Box does not stand for the proposition that a killing by virtue of insanity is not unlawful. Quite the contrary. It reemphasizes that the legislature has determined that legal insanity is a complete defense to a killing.

Although *Box* does distinguish self defense and insanity as a defense, it does so for the purpose of determining which party has the burden of proof. The *Box* Court said that self defense negates the mens rea of murder because it is defined as a lawful act. For insanity to be established as a defense the analysis must be taken one step further.

Although, a killing while legally insane may not be lawful in the sense that the state must disprove it, it is not unlawful if the defense can be established by the accused. The *Box* court makes the comment regarding lawfulness in a discussion of the reasons for the difference in the allocation of the burden of persuasion. The full context must be read to determine the import of that comment. It said at p. 329:

> Committing an act under an insane impulse does not make that act lawful. Rather if a claim of insanity is raised, once the elements of murder are proved, the defendant's inability to distinguish right from wrong is examined in an attempt to determine his or her **culpability** for the murder...insanity entitles a defendant to an **acquittal** not because it establishes innocence (i.e. state has failed to prove element of criminal intent) but because the state **declines to convict or punish** one shown to have committed the crime while impaired. In other words, the mental state of "insanity" does not go to the elements of the crime but merely the **ultimate culpability** of the accused. [Emphasis added]

There can be no legal distinction in the ultimate result whether one is found not guilty because of self defense or one is found not guilty by reason of insanity. The proposition that *Box* stands for is that the process to that result is different for each. In each case, however, the defense dictates that the individual is not legally culpable for his actions. In each case those actions cannot be said to be unlawful.

As can be seen, rather than defeating Mr. Hoge's claim, *Box* actually reinforces it. It reiterates that insanity is an ultimate defense that entitles an accused to an acquittal. Though at the end of the state's case it cannot be said that a legally insane person is innocent, by the end of the case a legally insane person's actions are not ruled unlawful. And that is the essential question here.

d. THE COURT OF APPEALS HAS MISPLACED RELIANCE ON COOK V. GISLER AND LEAVY V. METROPOLITAN.

The Court of Appeals cites *Cook* at p. 79 for the proposition that "As a matter of law, a homicide is an unlawful act unless it is excusable or justifiable." Nowhere does *Cook* make such a broad pronouncement. *Cook* was a case that involved an issue of self defense. It necessarily discussed justifiable homicide because that was the context of the case before it. *Cook* did not assert that as a matter of law acts are unlawful unless excusable or justifiable. Importantly, the issue of insanity as a defense was not before that court.

The Court of Appeals in its decision agreed that insanity absolved Mr. Hoge of any criminal liability. It then oddly goes on to cite *Leavy, Taber, Schultz, & Bergdahl v. Metropolitan Life Insurance Co.*, Wn. App.

503, 581 P.2d 167 (1978) when the Court of Appeals says:

> That may be true [that Mr. Hoge was absolved of criminal liability] but "[a] criminal conviction is not a sine qua non to application of the slayer's act."

First, in Mr. Hoge's case we are dealing with an acquittal because an affirmative defense was proven. In *Leavy*, the Court was referring to a case where the jury may not have been able to convict because the elements were not proven beyond a reasonable doubt or the person had not even be tried. In those situations, the proponent of the application of the slayer's statute could attempt to prove unlawfulness by a preponderance of the evidence in the civil matter. This is distinguishable from the case at bar where an affirmative defense was proven. Further, the estate has not asked for a hearin to in any way challenge that result.

Also the quoted portion of *Leavy* is part of a discussion as to whether the **willfulness** prong of the slayer's statute had been met, not unlawfulness. In *Leavy*, the court said there was no question on whether the acts in that case were unlawful because the potential heir was convicted of manslaughter. Mr. Hoge's case is different in an essential way. Here, the issue is when an affirmative defense of insanity has been proven, may Mr. Hoge's actions be said to be unlawful.

2. THE DEFINITION OF WILLFUL FOR PURPOSES OF THE SLAYER'S STATUTE IS INTENTIONALLY AND DESIGNEDLY.

In a case specifically deciding the definition of willful for purposes of the slayer's statute, the Supreme Court said in *New York Life Insurance Company v. Jones*, 86 Wn. 2d 44, 541 P.2d 989 (1975), that willful meant intentionally and designedly. This holding of the Supreme Court controls this matter.

Willful for purposes of the Slayer's Statute is not equated with intentional as used in the current criminal code. The Washington State Supreme Court has expressly defined willful as it applies to the Slayer's Statute as something more than intentional. In *Jones,* the Court looked to several sources for its definition. It looked to *State v. Spino*, 61 Wn.2d 246, 377 P.2d 868 (1963) which said willful meant intentionally and designedly. It looked to *State v. Russell*, 73 Wn.2d 903, 442 P.2d 988 (1968) which said willful means intentionally, deliberately and or designedly. It then looked to *Webster's Third New International Dictionary* 2617 (1968). *See* 45 *Words & Phrases* 313-28 (perm. ed. 1970).

The definition adopted by our Supreme Court that willful means intentional, designed and deliberate necessarily requires some rational

thought process which is precisely what Mr. Hoge did not possess the day of the killings.

a. A LATER ENACTED CRIMINAL STATUTE DOES NOT CHANGE THE SUPREME COURT'S DECISION REGARDING THE MEANING OF WILLFUL IN A CIVIL STATUTE.

The Slayer's Statute is a civil statute. It is found in the Revised Code of Washington under trust and probate law. It is not a part of the criminal code. The criminal law definitions do not control here. Further RCW 9A.04.090 by its terms applies to offenses defined in the criminal code. An offense is not what is at issue when deciding what willful means in the Slayer's Statute. RCW 9A.04.090 says:

> 9A.04.090. Application of general provisions of the code.
> The provisions of chapters 9A.04 through 9A.28 RCW of this title **are applicable to offenses defined by this title or another statute**, unless this title or such other statute specifically provides otherwise.

There is a whole body of civil law interpreting the meaning of willful. Just as the criminal code definitions would not control those cases, it does not apply here. The bringing of a criminal charge is not a predicate to application of the the Slayer Statute could apply when no

criminal charge is brought. The definition of willful does not have to do with whether an offense has been committed. That is a separate prong of the Slayer's Statute.

Further, it makes sense that the current Ch. 9A RCW definitions do not control here because the Slayer's Statute was adopted prior to the enactment of that statute. The legislature at the time of adopting the Slayer's Statute could not have intended a definition for willful not yet encoded. The question is what did the legislature intend when the Slayer's Statute was adopted.

b. THE EVIDENCE DOES NOT SUPPORT THE FINDINGS OF FACT THAT JOSHUA HOGE'S DELUSIONAL ACTS WERE WILLFUL.

The findings of fact of the trial court were not supported by substantial evidence. In fact the evidence does support a finding that Mr. Hoge's actions were not willful.

The undisputed facts regarding Mr. Hoge's mental illness are that he has had paranoid schizophrenia for years. His symptoms have remained consistently psychotic: he hears voices, has hallucinations, and lives under the incredibly overwhelming power of demonic delusions. His statements

immediately after the killings demonstrate the depth of his irrational and delusional thoughts. He believed his mother and brother were imposters. He thought he was acting to save his daughter, though he has no daughter. He spoke of spaceships, performing magic and time travel. He asked if he had died.

The estate is arguing that Mr. Hoge knew he was killing a human being. The estate, however, cannot rely on one statement from an entire fabric of an entrenched, chronic delusional system to prove Mr. Hoge's actions were willful, deliberative and designed. This court is not in a position to parse out which statements involved in his delusions are meaningful, rational or resistable and which are not. What the criminal court did find was that Mr. Hoge was out of his mind at the time of the killings.

From the evidence it is not clear Mr. Hoge understood what death or killing was. At the emergency room shortly after the killing, he asked the nurse if he had died.

However, whether or not Mr. Hoge knew he was killing a person is not the answer to the question before this court. The question before this court is whether his actions were willful. Under the facts of this case, it cannot be said that Mr. Hoge willfully killed his mother.

E. CONCLUSION

Mr. Hoge is asking this Court to find that the estate has not met its burden of showing his actions were unlawful or willful.

Respectfully submitted this 5th day of November, 2008.

JEAN O'LOUGHLIN, WSBA# 14756
Attorney for Appellant
949 Market Street, Ste 334
Tacoma, WA 98402
(253) 798-3980